

COPY
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHN GRIFFIN BOWIE

APPELLANT

VS.

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SUPREME COURT
COURT OF APPEALS

NO. 2007-CP-0898-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

This is an appeal from the denial of Post - Conviction Collateral Relief Act of the Circuit Court of Harrison County, Mississippi, in which the Appellant, John Griffin Bowie, pled guilty and sentenced for the felony crime of **BURGLARY**, Mississippi Code Annotated Section 97-17-33 (1972).

STATEMENT OF FACTS

On April 4, 1988 John Griffin Bowie ("Bowie") signed an affidavit in cause number 22,595 which was a Waiver of Indictment to the charge of Burglary. (R. 6). Bowie was found guilty based upon the facts offered to the court and the court adjudicated the defendant to be guilty of the charge of Burglary. (R. 6). Bowie later filed a motion for post conviction relief on December 12, 2005 relating to the aforementioned cause number. (R. 14). The Circuit Court of Harrison County denied the motion as time barred. (R. 21-22).

Bowie was represented by counsel when filing the petition to enter his guilty plea and was advised of his legal and constitutional rights. (R. 7). He was also advised of the consequences of such a guilty plea. (R. 7). The court found that the defendant knowingly and voluntarily waived his constitutional rights to trial and that his plea of guilty was freely and voluntarily made. (R. 7).

Bowie filed a successive motion for Post-Conviction Relief on January 10, 2007. (R. 33). The court found this motion to be a successive writ as set out in Mississippi Code Annotated section 99-39-23 and so ordered on March 5, 2007. (R. 42). Only after this second denial for post conviction relief relating to cause number 22,595 did Bowie appeal on March 14, 2007. (R. 43).

Bowie has completed the sentence in cause number 22,595 and is currently incarcerated, serving a sentence in cause number B2401-2002-00756. (Brief for Appellant at 2). Bowie also filed for post conviction relief relating to cause number B2401-2002-00756 and the motion was denied May 13, 2005. (R. 21).

SUMMARY OF THE ARGUMENT

I.

THE APPELLANT IS PROCEDURALLY BARRED FROM BRINGING A MOTION FOR POST-CONVICTION RELIEF TO REDUCE SENTENCE.

Mississippi Code Annotated section 99-39-23(6) reads in pertinent part: The order as provided in subsection (5) of this section or any order dismissing the prisoner's motion or otherwise denying relief under this article is a final judgment and shall be conclusive until reversed. It shall be a bar to a second or successive motion under this article ... [E]xcepted from this prohibition are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence. Likewise excepted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked.

THE ARGUMENT

PROPOSITION I.

THE APPELLANT IS PROCEDURALLY BARRED FROM BRINGING A MOTION FOR POST-CONVICTION RELIEF TO REDUCE SENTENCE.

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The exceptions under Mississippi Code Annotated Section 99-39-23(6) allow the filing of a successive writ only if the argument presented within the writ falls under one of the exceptions and has not been previously argued and a decision rendered on the merits by the trial court. Stone v. State, 872 So.2d 87, 89 (Miss. Ct. App. 2004); Sneed v. State, 722 So.2d 1255, 1256 (Miss. 1998).

An exception to procedural bars may be found if a fundamental constitutional right would otherwise be denied. Lockett v. State, 582 So.2d 428, 430 (Miss. 1991) held that sentence of life imprisonment involved denial of due process in sentencing and therefore surmounted the procedural time bar. However, merely raising a claim is insufficient to surmount the procedural bar. Davis v. State, 958 So.2d 252, 254 (Miss. Ct. App. 2007); Beville v. State, 669 So.2d 14, 17 (Miss. 1996). To be successful on a motion for post-conviction relief, a defendant bears the burden of proving by a preponderance of the evidence that he is entitled to post-conviction relief. Golden v. Epps, 958

So.2d 271, 274 (Miss. Ct. App.2007). There is no automatic right to an evidentiary hearing under the Mississippi Uniform Post-Conviction Collateral Relief Act. Hardiman v. State, 904 So.2d 1225, 1228 (Miss. Ct. App.2005). Once a prima facie case is established, the court may still proceed under Section 99-39-19 (Supp. 2006) and summarily deny a petitioner's motion if, after the answer has been filed and discovery completed, it appears that no evidentiary hearing is warranted. Porter v. State, 2007 WL 1334487 (¶9) (Miss. Ct. App.2007).

Section 99-39-11 reads in part:

(2) If it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, the judge may make an order for its dismissal and cause the prisoner to be notified.

Of further importance, a guilty plea is considered voluntary and intelligent if the defendant is advised about the nature of the charge against him and the consequences of the entry of the plea. Shanks v. State, 2007 WL 1675202 (¶ 9) (Miss. Ct. App.2007).

Luckett v. State is distinguishable from Bowie's case. Luckett was sentenced to life in prison for forcible rape of a female over twelve years old. Luckett, 582 So.2d at 430. His petition for post-conviction relief was time-barred because it was raised more than nine years after the entry of the guilty pleas. Id. However, the court ruled that his sentence was a denial of a fundamental constitutional right where the appellant showed that he was sentenced to a greater sentence than the statute allows a judge to impose in such a case. Id.

Bowie has made no showing that he did not voluntarily make his guilty plea. He has merely made allegations unsupported by facts and evidence. In fact, all the evidence in his case show that he voluntarily plead guilty to burglary. As cited in appellant's brief, Bowie was present and represented by counsel on the day of his conviction and sentence. (R. 7). Bowie filed the petition

to enter a guilty plea and was advised of his legal and constitutional rights, and was further advised of the consequences of such a plea. (R. 7). Only then did Bowie enter his plea of guilty to the said charge. (R. 7). As a result, the court found that Bowie freely and voluntarily pleaded guilty. (R. 7).

Moreover, Bowie served his entire sentence under cause number 22,595 and did not file for post conviction relief until his time served under this sentence was complete. If Bowie's plea had indeed been involuntary, it is substantially unlikely that he would have served the entire sentence and not file a motion for post conviction relief until eighteen years after the alleged involuntary plea. The only evidence that Bowie offers is that he did not sign paragraph 13 of the Petition to Enter Plea of Guilty, and therefore Bowie has not met his burden of proof by a preponderance of the evidence. Since Bowie has not met his burden of proof in showing that a fundamental constitutional right has been violated, his arguments do not fall within an exception to Section 99-39-23(6) and is therefore time barred.

Bowie's arguments actually amount to an ineffective assistance of counsel argument as evidenced by his claim that the court presumed that his attorney "advised him of the law in relation to the facts" and that his "voluntary plea was made in ignorance." (Appellant Brief 5). To establish an ineffective assistance of counsel claim, defendant must prove that under the totality of the circumstances: (1) counsel's performance was deficient and (2) deficient performance deprived defendant of a fair trial. Simon v. State, 857 So.2d 668, 682 (Miss. 2003). While this court has held that ineffective assistance of counsel can rise to the level of violation of a fundamental constitutional right, it has also held that *mere assertions of ineffective assistance are not sufficient to establish that fundamental constitutional rights have been violated.* Shorter v. State, 946 So.2d 815, 819 (Miss.

Ct. App.2007); Berry v. State, 924 So.2d 624, 626 (Miss. Ct. App.2006) (emphasis added) (holding that defendant's motion for post-conviction relief was appropriately denied as a successive writ where there was no evidence in the record suggesting that defense counsel acted other than capably).

Although no transcript is provided by the petitioner, the record shows that Bowie's counsel was present at his plea hearing and that Bowie understood that he was waiving his indictment. (R. 7). Bowie has put on no proof that he could not read or effectively comprehend the Waiver of Indictment that he signed which stated that he was fully and completely advised of the charge against him. (R. 17). The Circuit Court of Harrison County found that Bowie knowingly and voluntarily waived his constitutional rights and that his plea was freely and voluntarily made. (R. 16). Although there is no signature on paragraph 13 of the Petition to Enter Plea of Guilty (R. 19), the burden of proof is by a preponderance of the evidence and the evidence supports that Bowie's plea was made voluntarily. Therefore, absent the showing of a violation of a fundamental constitutional right, Bowie's third motion for Post-Conviction Relief is procedurally barred as a successive writ pursuant to Mississippi Code Annotated Section 99-39-23, (Supp. 2006).

Lastly, it is in the judge's discretion to determine whether the issues presented warrant an evidentiary hearing. Coleman v. State, 2007 WL 1677403 (¶ 24) (Miss. Ct. App. 2007). Twice has Bowie submitted motions for post-conviction relief and he has twice been denied an evidentiary hearing. Once again, Bowie has presented no legitimate supporting evidence that would warrant an evidentiary hearing. Moreover, the affidavit in the record, the Waiver of Indictment, supports the State's case that Bowie did voluntarily and knowingly plea guilty.


CONCLUSION

Based upon the arguments presented herein as supported by the record, on appeal the State would ask this reviewing court to affirm the order denying the Motion for Post-Conviction Relief

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deshun T. Martin, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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Circuit Court Judge
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This the 16th day of August, 2007.



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